No. 1266

In the Supreme Court of the United States

OCTOBER TERM, 1944

ANNA M. BOUTELL AND CARROLL M. BOUTELL, DOING BUSINESS AS F. J. BOUTELL SERVICE COMPANY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

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OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 20, 23–24) are not reported. The opinion of the circuit court of appeals (R. 38–42) is reported in 148 F. 2d 329.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 14, 1945 (R. 37). The

petition for a writ of certiorari was filed on May 14, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners' employees, who are engaged exclusively in repairing and maintaining vehicles of a single interstate motor carrier, are engaged in a "service establishment the greater part of whose * * * servicing is in intrastate commerce" within the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act.

2. Whether employees of a commercial garage which is not a carrier but is engaged exclusively in repairing and maintaining vehicles of an interstate motor carrier, are "employee[s] with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935" within the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act.

STATUTES INVOLVED

The statutory provisions involved are Sections 13 (a) (2) and 13 (b) (1) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*, and Section 204 (a) of the Motor Carrier Act of 1935, c. 498, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*

The pertinent portions of the Fair Labor Standards Act read as follows:

> SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *.
>
> (b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *.

The relevant provision of the Motor Carrier Act reads as follows:

> SEC. 204 (a). It shall be the duty of the Commission:
>
> (1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

Similar provisions are made in Section 204 (a) (2) and 204 (a) (3) for the regulation of con-

tract and private carriers, respectively. Other provisions of the Motor Carrier Act referred to in this brief are printed in the Appendix.

STATEMENT

This suit was brought by the Administrator of the Wage and Hour Division to enjoin petitioners from violating the maximum hours provisions of the Fair Labor Standards Act (Section 7) (R. 2–5). Petitioners are members of a partnership doing business under the name of the F. J. Boutell Service Company. The partnership operates a place of business in the city of Toledo, Ohio, where it is engaged in the repair and maintenance of the motor transportation equipment owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation, and is an entity separate and distinct from the business involved in the instant case, although the members of the partnership are the sole stockholders of the Drive-Away Company (R. 23). Substantially all of the business of the Drive-Away Company has been transportation of goods in interstate commerce. Petitioners' employees involved in this action are mechanics engaged in greasing, repairing, servicing, and maintaining the transportation equipment owned and operated by the Drive-Away Company (R. 24).

The case came up for decision, upon the Administrator's motion for summary judgment on the pleadings, after petitioners had filed an

answer admitting that they were not paying overtime compensation in compliance with Section 7 of the Fair Labor Standards Act but asserting that they were exempt from such requirement. The district court held (1) that petitioners' place of business is not a retail or service establishment within the meaning of Section 13 (a) (2) of the Act "since the greater part of its servicing or selling is not in intrastate commerce and since it does not serve the general consuming public" (R. 24); and (2) that petitioners' employees are not employees of a "carrier" and are therefore not subject to the exemption provided in Section 13 (b) (1) of the Act (*ibid.*). The circuit court of appeals affirmed (R. 37). It said that the claim to exemption as a service establishment "is disposed of by the finding of the court and the concession of the appellants that substantially all of the business of the Drive-Away Company is in interstate commerce" (R. 39–40), and, with respect to the claim of exemption under Section 13 (b) (1), that the wording and legislative history of the Motor Carrier Act and its administrative interpretation demonstrate that Congress did not intend to vest in the Interstate Commerce Commission jurisdiction over employees of other than carriers (R. 42).

ARGUMENT

1. As the circuit court of appeals ruled, the fact that the greater part of the work performed by petitioners is on transportation facilities used

in interstate commerce suffices to demonstrate the inapplicability of the exemption provided by Section 13 (a) (2). "Section 13 (a) (2) by its very terms exempts only those employees engaged in a retail or service establishment operating primarily in local commerce." *A. H. Phillips, Inc.* v. *Walling,* No. 608, this Term, slip opinion, p. 4. Since substantially all of the business of the carrier upon whose trucks petitioners' employees work is admittedly in interstate commerce (R. 24), the employees working on these trucks are clearly engaged in interstate commerce. *Overstreet* v. *North Shore Corp.,* 318 U. S. 125; *Pedersen* v. *J. F. Fitzgerald Const.* Co., 318 U. S. 740. Employees so engaged in interstate commerce are not furnishing services "in intrastate commerce" within the meaning of the Section 13 (a) (2) exemption. See *McLeod* v. *Threlkeld,* 319 U. S. 491, 494, footnote 6; see also *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 526; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 107 (C. C. A. 9). The decision in *Martino* v. *Michigan Window Cleaning Co.,* 145 F. 2d 163 (C. C. A. 6), certiorari denied February 26, 1945, No. 849, this term, upon which petitioners particularly rely (Br. 14–16), is not contrary to this conclusion; in the *Martino* case, the court concluded that window cleaning was not interstate commerce or production of goods for commerce. Whatever the merit of that decision, the window-cleaners in that case, unlike the employees here

involved, were not "engaged in actual work upon the transportation facilities". *McLeod* v. *Threlkeld, supra.*

An additional reason for the inapplicability of the exemption, a ground relied upon by the district court, is that petitioners' truck repair shop is not a "service establishment" because its services are not offered to customers generally. It has been the uniform view of the courts that the term "service establishment", as used in this Section, refers to establishments which offer their services to customers generally. See *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 107 (C. C. A. 9); *Fleming* v. *A. B. Kirschbaum Co.,* 124 F. 2d 567, 572 (C. C. A. 3), affirmed, 316 U. S. 517, 526; see also *Walling* v. *Consumers Co.,* 8 Wage Hour Rept. 350 (C. C. A. 7, 1945); *Bracey* v. *Luray,* 138 F. 2d 8 (C. C. A. 4); *Guess* v. *Montague,* 140 F. 2d 500 (C. C. A. 4); *Collins* v. *Kidd Dairy & Ice Co.,* 132 F. 2d 79 (C. C. A. 5). While there has been some divergency among the circuits with respect to the question whether the private or industrial character of the customers is material to the application of the exemption,[1] the instant case does not require determination of that controversial issue. For petitioners' establishment does not offer its services to either pri-

[1] This question is involved in *Roland Electrical Co.* v. *Walling,* pending on petition for certiorari, No. 1033, this Term, and the Government did not oppose granting the writ on this issue. See Memorandum for Respondent, pp. 7–8.

vate or industrial customers generally, but is operated exclusively for the purposes of a single business organization. The cases relied upon by petitioners (Br. 13–14) are not in point, as the establishments in all of those cases catered to various customers, although in a few instances the customers were largely commercial and industrial rather than private consumers.

2. Although the work performed by petitioners' employees may affect the safety of the operation of the motor vehicles in interstate transportation, they are not employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935" within the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act. The court below correctly ruled that Section 204 of the Motor Carrier Act of 1935 was intended to give the Commission the power to establish hours of service for employees of motor *carriers only*. This construction is supported by the entire framework of the Motor Carrier Act, by the legislative history, and by the Interstate Commerce Commission's interpretation of its jurisdiction.

The terminology used throughout the Motor Carrier Act reflects a Congressional purpose to confine its operation to carriers. Section 204 (a) confers power upon the Commission "to regulate * * * carriers" and "to that end" to

establish maximum hours of service of employees. Section 202 (a), defining the scope of the Act, states that it applies to "transportation of passengers or property by motor carriers". Section 204 (a) (4a) speaks of "regulation by the Commission of interstate or foreign transportation by motor carriers." Section 204 (c) authorizes the Commission to "investigate whether any motor carrier" has failed to comply with the statute and to issue orders compelling such compliance. Finally, in Section 226,[2] the Commission is empowered to investigate and report the need for regulation of "maximum hours of service of employees *of all motor carriers and private carriers* of property by motor vehicle". [Italics supplied.][3]

When the amendment to paragraphs (1) and (2) of Section 204 (a), to include the words giving the Commission power to regulate the maximum hours of service of employees, was proposed, Senator Wheeler, chairman of the Committee on

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[2] This was originally Section 225 but was renumbered. 54 Stat. 929.

[3] In discussing Section 204 (a), Senator Wheeler, sponsor of the bill, stated that "the exercise of this power [conferred by Section 204 (a)] with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for *regulation of this kind* provided for in section 225." 79 Cong. Rec. 5652. [Italics supplied.] Section 204 (a) was evidently intended to grant the Commission regulatory powers over exactly the same matters as it was empowered to investigate in Section 226; that is, the "maximum hours of service of employees" in Section 204 (a) means "maximum hours of service of employees of all motor carriers," as explicitly stated in Section 226.

Interstate Commerce and sponsor of the bill, stated that the purpose of their inclusion was "to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of common and contract *carriers.*" 79 Cong. Rec. 5652. [Italics supplied.] Subparagraph (3), providing for regulation of private carriers, was similarly amended so as to give the Commission like authority with respect to "the employees of such *operators.*" 79 Cong. Rec. 5652. [Italics supplied.] See also S. Rep. No. 482, 74th Cong., 1st sess., p. 1. Congressional reports and debates in both Houses disclose that the purpose was to regulate motor carriers alone; there is no indication of any intent to regulate hours of workers employed by anyone else.*

* Representative Sadowski of the House Committee on Interstate Commerce, in discussing Section 204, said that "these provisions as laid down by the Commission must be observed by all motor carriers," and that the Committee "decided to leave maximum hours of service up to the rules of the Commission so that this new legislation would be flexible to meet all the labor situations among the various classes of motor-carrier operators to be regulated," 79 Cong. Rec. 12,205. Representative Pettengill, quoting Commissioner Joseph B. Eastman, generally credited with the authorship of the Motor Carrier Act (see *United States* v. *American Trucking Assns.*, 310 U. S. 534, 538), stated: "The bill * * * gives the Commission authority to prescribe maximum hours of service for the employees of common carriers, contract carriers, and private carriers of property." 79 Cong. Rec. 12,229. To the same effect see the remarks of Senator Couzens, 79 Cong. Rec. 5660, and of Representatives Wadsworth and Crawford, 79 Cong. Rec. 12,198.

That the congressional intent was so limited is confirmed by the legislative history of Section 13 (b) (1) of the Fair Labor Standards Act. The parent of the present Section first appeared as an amendment to S. 2475, 75th Cong., 1st sess., proposed by Senator Moore, to amend the definition of "employee" in the Act so that its maximum hours provisions would not apply to "any employee of any common carrier by motor vehicle subject to the qualifications and maximum hours of service provisions of the Motor Carrier Act, 1935, provided that the wage provisions of this Act shall apply." H. Rep. No. 1452, 75th Cong., 1st sess., p. 11. This language was unchanged through five drafts of the bill, but in the House Committee print of December 14, 1937, 75th Cong., 2d sess., the wording was changed to "any employee with respect to whom the Interstate Commerce Commission has power to prescribe maximum hours of service. * * * *Provided, however,* That the wage provision shall apply to employees of *such carriers* by motor vehicle." [Italics supplied.] That the altered wording was not intended to extend the hours exemption to workers other than employees of carriers is clear from the retention of the proviso. Section 13 (b) (1) appeared for the first time in the House Committee print of S. 2475, April 15, 1938, 75th Cong., 3d sess., p. 58. The House report indicates that the change in language occurred in the course of adopting a new drafting technique designed to

simplify the Act by placing "all of the exemptions in a single exemption section", and that there was no intent to change the original meaning of the exemption. H. Rep. No. 2182, 75th Cong., 3d sess., p. 13.[5]

The Interstate Commerce Commission has never asserted jurisdiction over any employees except those of carriers, and has stated specifically that it has no jurisdiction over employees working in a commercial garage such as that here involved: "By far the larger proportion of the carriers subject to our jurisdiction operate less than 10 vehicles and do not employ mechanics to repair their vehicles, but on the contrary have such work done in commercial garages. *We have, of course, no jurisdiction over employees working in commercial garages.*" [Italics supplied.] *Ex Parte No. MC-2, Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125, 132; and see *Ex Parte No. MC-3, Motor Carrier Safety Regulations—Private Carriers*, 23 M. C. C. 1, 7–8, 9. See also *Dixie Ohio Express Co.*, 17 M. C. C. 735; *Columbia Terminals Co.*, 18 M. C. C.

[5] "Section 11 of the committee amendment contains the exemptions from the provisions of the act. As stated above, exemptions were made in the Senate bill by the device of excluding the individuals to be exempted from the definition of 'employee.' This device seriously complicated the child-labor provisions of the act, inasmuch as the term 'employee' was used in those provisions. Hence the committee has adopted the device of placing all of the exemptions in a single exemption section."

662; *U-Drive-It Co. of Pa. Inc.*, 23 M. C. C. 799; *C. E. Hall and Sons*, 24 M. C. C. 33.*

It is true that petitioners' garage employees work only on trucks operated by a carrier corporation whose stock is owned by petitioners. If petitioners had chosen to do so, they could have conducted their motor transportation business and their garage business as a single enterprise and thus brought their garage employees within the jurisdiction of the Interstate Commerce Commission and therefore within the exemption created by Section 13 (b) (1) of the Fair Labor Standards Act. The record does not show petitioners' reasons or motives for organizing their garage and motor transportation as two separate businesses. Presumably this was done in order to secure advantages which petitioners would not

* The case of *Keegan* v. *Ruppert*, 6 Wage Hour Rept. 676 (S. D. N. Y., 1943) principally relied on by petitioners (Br. 17–18), does not support the contention that employees of noncarriers are also within the exemption. As petitioners point out, the employer there, in contrast to the employer in the instant case, owned the trucks on which the employees worked (Br. 18), and the opinion shows that the employer's operations and affiliations with various shippers and carriers were quite complicated. Although the basis of its ruling that the exemption applied to the mechanics who worked on the trucks is not entirely clear, the court appears to have assumed that the employer was some kind of "carrier" within the scope of the Motor Carrier Act. See 6 Wage Hour Rept. at 679. See also the subsequent ruling of the Interstate Commerce Commission holding that the employer involved in that case was a contract carrier with respect to its operations of furnishing trucks *with drivers* to shippers. *John J. Casale, Inc.*, 44 M. C. C. 45, 60.

enjoy if these activities were operated as a single business. It is therefore entirely proper that the separate organization which excludes the garage employees from regulation by the Commission should also remove them from the scope of the exemption provided by the Fair Labor Standards Act.[7]

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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JUNE 1945.

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[7] Interpretative Bulletin No. 9, referred to by petitioners (Br. 20–21), applies to employees of wholesale establishments which, as private carriers covered by Section 204 (c) (3) of the Motor Carrier Act of 1935, operate their own vehicles. It is concerned only with the policy to be applied in determining whether, under the Motor Carrier Act, such employees are engaged in interstate commerce (cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564), and does not deal with a situation, like that here involved, in which the employees do not work for a carrier.

APPENDIX

The provisions of the Motor Carrier Act of 1935 (49 Stat. 543; 54 Stat. 919; 56 Stat. 300; 49 U. S. C. 301, *et seq.*), to which reference is made, are:

SEC. 202 (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

* * * * * *

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

* * * * *

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water-carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight for-

warder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

SEC. 203 (a) As used in this part—

* * * * *

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is

the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * *

SEC. 204 (a). It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of sections 204 (c); 205; 220; 221; 222 (a), (b), (d), (f), and (g); and 224.

* * * * *

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this part, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. Upon any revocation of any such certificate, the

Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier under this subparagraph, accompanied by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this part beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this part as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption. Applications under this subparagraph shall be made in writing to the Commission, verified under

oath, and shall be in such form and contain such information as the Commission shall by regulations require.

* * * * * *

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

* * * * * *

SEC. 226. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter.

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